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No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,

Petitioners,

v.

MAGNO J. ORTEGA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

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QUESTIONS PRESENTED

1(a). Whether, in the absence of any regulation or established policy to the contrary, a public employee has a reasonable expectation of privacy in his office, including his desk and file cabinets, when that office has never been entered without the employee's permission and remains locked when he is not present.

(b). Whether, in circumstances where a public employee has a reasonable expectation of privacy in his office, a comprehensive search of that office designed to uncover personal materials for use against the employee in a termination proceeding may be conducted whenever the employee's supervisor, in his sole discretion, determines that the search is in furtherance of any work-related concern.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

STATEMENT

This case involves a search of a government employee's office, including his desk and file cabinets, conducted to uncover evidence relating to charges of employment violations pending against him. Respondent, Dr. Magno Ortega, is a psychiatrist who worked at Napa State Hospital, a California facility for the mentally ill, from 1964 until his termination in 1981. During that time, he served as Chief of Professional Education, with primary responsibility for training physicians in psychiatric residency programs. In 1981, when the events relevant to this litigation occurred, Dr. O'Connor was the Executive Director of Napa and the other petitioners were key administrative and clinical personnel.

On July 30, 1981, Dr. O'Connor advised Dr. Ortega of his "intentions to investigate management practices of your department." J.A. 8.[1] The investigation was being conducted primarily because of concerns about the way in which Dr. Ortega had purchased a computer for use in the residency program. The allegations were that Ortega had misled Dr. O'Connor into believing that the computer had been donated when, in fact, he had pressured the residents into contributing to its cost, and that he had taken disciplinary action against a resident who resisted

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[1] Dr. O'Connor also requested on July 30 that Ortega go on administrative leave during the investigation; he agreed to allow him to take a two-week vacation instead, so long as he remained off hospital grounds. Thereafter, in a letter dated August 14, 1981, O'Connor advised Ortega that the investigation had not been completed and that he was being placed on administrative leave as of August 17, 1981. Dr. Ortega was paid his salary during this leave period until his termination on September 22, 1981. J.A. 8, 9, 29-30.

his efforts. In addition, two hospital workers had charged that Dr. Ortega made sexual advances toward them. J.A. 30-33, 49.[2]

To conduct the investigation, Dr. O'Connor selected three hospital personnel, including the administrator and an internal hospital security officer. As part of their investigation, these officials repeatedly went into Dr. Ortega's office—a locked private office that he had occupied during his entire seventeen years at the hospital and which apparently had never previously been entered when he was not present. J.A. 14. To gain access, the investigators first used a pass key and later changed the locks. All entries were made in the evening when no one else was in the area. J.A. 53, 58.

Once in the office, the investigators thoroughly examined its contents. They took a Valentine's card, a private photograph, and a book of poetry—all personal items given to Dr. Ortega ten years earlier by a former resident—as well as some documentation regarding his billings of a private (non-hospital) patient under the California Medicaid program. No inventory of the property in the office was made, nor were any state papers or files retrieved. Rather, after seizing the items just mentioned, the investigators placed all of the remaining papers in boxes and then put them in storage for Ortega to pick up. J.A. 15, 42, 54-58, 62. Subsequently, at Dr. Ortega's termination hearing, when he sought to introduce the testimony of his former resident, the state's attorney first threatened to, and then did, attempt to impeach her by

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[2] These claims were subsequently upheld in an administrative hearing before the California State Personnel Board. Pet. App. 9-15. That decision is currently on appeal in state court.

introducing the personal materials taken from Dr. Ortega's office. J.A. 10, 15.

Based on the search of his office and seizure of his papers, Dr. Ortega filed the instant action in July 1982, alleging Fourth Amendment violations as well as pendent state law privacy claims. On cross-motions for summary judgment, the district court ruled orally for petitioners on all counts. Relying on *Chenkin* v. *Bellevue Hospital Center*, 479 F. Supp. 207 (S.D.N.Y. 1979), the court found that the search was proper since there was a need to "secure the office" in order to protect "[s]tate property." J.A. 23. The court also stated that the "[s]eizure of personal effects may seem overly intrusive, but the degree of intrusion was minimized, once again, by the consideration of the plaintiff was aware of the investigations and could have participated." *Ibid.*[3]

The Court of Appeals for the Ninth Circuit reversed on the § 1983 claim.[4] It first noted that Ortega's locked office, which contained personal papers and "sensitive and confidential information about patients or people with whom he dealt, had never been entered without his permission." Pet. App. 4. It also pointed out that "Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated Ortega's

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[3] Later in the same hearing, the court acknowledged that this conclusion may have been incorrect and indicated that a motion for reconsideration would be in order. J.A. 24-25. None was filed, however, even though the record is clear that Dr. Ortega did not know that the searches were taking place and was never asked to participate. J.A. 40.

[4] The court affirmed the dismissal of the state law claims on the ground that they had not first been filed with a state board as required under California law. Pet. App. 7.

expectation of privacy in his office." Pet. App. 6. In these circumstances, the court concluded, Ortega had "a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable." Pet. App. 4. The court further found that the search in question had violated respondent's Fourth Amendment rights, noting that "[t]he entry into Ortega's office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega." Pet. App. 6. Based on these rulings, summary judgment was granted for Ortega and the case was remanded for a determination of damages.

SUMMARY OF ARGUMENT

1. The Fourth Amendment protects individuals against unreasonable searches and seizures in circumstances where they have a legitimate expectation of privacy. To have such an expectation, an individual must demonstrate a subjective intent to preserve his privacy, and society must be willing to recognize his expectation as reasonable. *See, e.g., Smith* v. *Maryland*, 442 U.S. 735, 740 (1979). In the instant case, respondent's subjective expectation was indisputable: he kept personal materials in a locked office that had never before been entered without his permission. An employee's expectation of privacy within his work office, moreover, is one that society is prepared to recognize as reasonable. *See Mancusi* v. *DeForte*, 392 U.S. 364, 368-70 (1968).

The government's interests as owner and employer are not sufficient to defeat a public employee's reasonable expectation of privacy. Legitimate ownership interests can be satisfied without sacrificing the non-owner occupant's basic Fourth Amendment protections. *See, e.g., Stoner* v. *California*, 376 U.S. 483, 489-90 (1964). Like-

wise, the government's interest in operating an efficient workplace is not incompatible with respecting an employee's expectation of office-based privacy. Even assuming that an employee typically may not reasonably expect that supervisors or co-workers will never enter his office when he is not present, that does not mean that his whole office, including the desk and file cabinets, is open to routine scrutiny. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 329 (1979). The contrary position taken by petitioners would allow any governmental authority, including the police, to search a public employee's office for any reason whatsoever. Such a result, aside from providing public employees with less Fourth Amendment protection than private employees, denigrates important constitutional interests for no legitimate reason.

2. The warrantless search of respondent's office in the circumstances of this case was impermissible. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States* v. *Karo*, 104 S. Ct. 3296, 3304 (1984). None of these exceptions apply here, however. The search was focused on a particular individual under investigation for having committed serious workplace violations, and was neither limited in scope nor conducted under exigent or special circumstances. Petitioners' attempt to analogize this case to the school search involved in *New Jersey* v. *T.L.O.*, 105 S. Ct. 733 (1985), is unconvincing. The special needs of the school environment—including particularly the need to maintain order and discipline when dealing with youngsters—are not a comparable concern in the workplace.

Nor is the government's need to maintain an efficient workplace adequate to support a watered-down standard

of Fourth Amendment reasonableness for an investigative work-related search. Most relevant to satisfying that need, of course, is the employer's ability to observe his employees, speak with their supervisors and co-workers, and review the business records and files that they use in their work. Significantly, an employer can accomplish all of those things without a search; even when it wants to access to business papers used or prepared by an employee, they must be yielded on demand. *See Wilson* v. *United States*, 221 U.S. 361, 380 (1911). Thus, the only material that a government employer cannot secure without a search is the private papers and effects that an employee keeps in his office. When an employer seeks access to that material, however—to use as evidence against an employee in a job termination proceeding—the relevant individual and government interests at stake are very similar to those involved in a criminal investigation and, therefore, support application of the traditional Fourth Amendment standard of a warrant based on probable cause. *Cf. Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (protection of a public employee's Fifth Amendment privilege against self-incrimination).

In any event, petitioners' assertion that an office search by a government employer should be found reasonable whenever it is conducted for a work-related purpose is unsupportable. Any investigative search that is focused on a particular individual must, at a minimum, be based on reasonable suspicion. *See New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 744. Even under that standard, the instant search was improper.

ARGUMENT

I. A PUBLIC EMPLOYEE'S EXPECTATION OF PRIVACY IN HIS OFFICE, DESK AND FILE CABINETS IS ENTITLED TO FOURTH AMENDMENT PROTECTION.

Petitioners surreptitiously entered respondent's locked work office and thoroughly searched it as well as his desk

and file cabinets. They seized several personal documents for use in an ongoing investigation that led to the firing of respondent, and then placed everything else in boxes for his retrieval. On these facts, petitioners take the position that their activities do not even implicate the Fourth Amendment since, in their view, a public employee can never have a legitimate expectation of privacy in his office, desk or file cabinets. This categorical position has little to recommend it, to say nothing of the fact that it flies in the face of basic Fourth Amendment principles.

As we show, an employee frequently expects his office to be a place where he can safely keep private materials. This expectation is plainly a reasonable one, and is entitled to Fourth Amendment protection. There is nothing about the government's interests as owner or employer that justifies the total obliteration of its employees' office-based privacy. That extreme view would cut a broad swatch in individual privacy, and would do so for reasons that go far beyond any legitimate government interests that might be at stake.

A. An Employee's Subjective Expectation Of Privacy In His Office, Desk And File Cabinets Is Recognized By Society As Reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). Consistent with this purpose, the scope of the Amendment's protection has been expanded far beyond the "paradigmatic entry into a private dwelling by a law enforcement officer in search of

the fruits or instrumentalities of crime." *Michigan* v. *Tyler*, 436 U.S. 499, 504 (1978). It also covers individuals in a variety of other circumstances, *see, e.g.*, *Katz* v. *United States*, 389 U.S. 347, 352 (1967) (public telephone); *Stoner* v. *California*, *supra*, 376 U.S. at 490 (hotel room), and even when the purpose of a search or seizure is to enforce a civil or an administrative requirement, *see, e.g.*, *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 741 (school rules); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (federal work-safety regulations).

The applicability of the Amendment in any particular case depends on whether the person invoking it "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expection of privacy' that has been infringed by government action." *Smith* v. *Maryland*, *supra*, 442 U.S. at 740. This inquiry, in turn, "normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' . . . The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *Ibid.*, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J. concurring).

In the instant case, respondent's subjective expectation of privacy in his office at Napa State Hospital is not disputed. Nor could it be. He had occupied the same office (which bore his name) for seventeen years. During that time, so far as the record reveals, the office had *never* been entered without respondent's permission. It was locked when he was not present and, with the exception of the furnishings, everything else that was stored in the office belonged to him. Significantly, this included the psychiatric records of his private (non-hospital) patients, records that under California law respondent is required to

keep confidential. *See* Cal. Civil Code § 56-56.16. In addition, respondent also kept personal correspondence and memorabilia as well as personal financial information in the office. J.A. 14.[5]

In contrast to these personal materials, the hospital records and files that respondent worked with were not stored in his office, but were kept instead in file cabinets located in the adjoining secretarial area. J.A. 14, 21. Not surprisingly, therefore, except for the items that were seized for use in the investigation—which were clearly personal, J.A. 42—petitioners agreed that Ortega could have back everything else that had been taken from the office. J.A. 58, 62. Collectively, these considerations amply demonstrate that Dr. Ortega certainly considered his office to be a place where he could safely keep private items, and that, if anything, he "took [more than] normal precautions to maintain his privacy." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

Turning next to the objective element of the Fourth Amendment test, it is settled that "no single factor invariably will be determinative" of this inquiry. *Rakas* v.

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[5] According to Dr. Ortega's uncontroverted affidavit, the following materials were stored in his office:

"(a) Purely personal correspondence from friends and family.

(b) Photographs of friends, acquaintances, and family.

(c) Medical files and correspondence from private patients unconnected to Napa State Hospital.

(d) Appointment books and personal notes, as well as official appointments.

(e) Personal financial records and accounts.

(f) A file approximately 18 feet long of IBM cards containing teaching aids and notes.

(g) Personal souvenirs, gifts and presents belonging to plaintiff.

(h) Copyrighted manuscript." J.A. 14.

Illinois, 439 U.S. 128, 152 (1978) (Powell, J. concurring). Thus, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, 104 S. Ct. 1735, 1741 (1984) (citations omitted). Tested against these criteria, it is clear that an employee's expectation of privacy in his business office is one that "society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J. concurring).

To begin with, as the Court has already noted, "[t]he Fourth Amendment's protection of offices and commercial buildings . . . [is] based upon societal expectations that have deep roots in the history of the Amendment." *Oliver* v. *United States*, *supra*, 104 S. Ct. at 1741 n.8; *see also Gouled* v. *United States*, 255 U.S. 298, 303-05 (1921); *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). This historical view is reinforced by contemporary understandings as well. As the Court put it in *Hoffa* v. *United States*, 385 U.S. 293, 301 (1966) (footnote omitted), "[w]hat the Fourth Amendment protects is the security a man relies upon when he places . . . his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. . . . And when he puts something in his file cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure." *See also See* v. *City of Seattle*, 387 U.S. 541, 543 (1967); *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 312.

For most people, next to the home, the office—where they usually spend the majority of their waking hours—is the most significant enclave of privacy that they enjoy.

While it is true that "it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes," U.S. Br. at 9, it is also true that everyone understands that a reasonable amount of private activity will take place there as well. It is well known, for example, that individuals make and receive private calls on their office phones, even though such phones are provided for work-related purposes. Similarly, individuals sometimes receive private correspondence at the office, frequently marked "personal and confidential" so as to ensure that it will not be opened along with the business mail. These letters, as well as other private material—such as personal financial papers that an individual may work on during a free lunch hour or coffee break—are often kept at the office, at times, perhaps, because a person may wish to keep certain matters private even from those with whom he lives.

These understandings about office-based privacy plainly extend to employees as well as employers. Indeed, the legitimacy of an employee's office-based expectation of privacy has already been upheld by this Court on facts that were considerably less compelling than those presented here. In *Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368-70, a union official who *shared* offices with other employees was found to have a sufficient privacy interest to allow him successfully to suppress criminal evidence secured through a warrantless search that led to the seizure of *union* records. This broad view of employee privacy is consistent with the recognition that an office is among the areas that "deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, *supra*, 104 S. Ct. at 1741.

These established principles notwithstanding, petitioners take the view that, by working for the govern-

ment, an employee loses all constitutional protection with respect to the privacy of his office, desk and file cabinets. That position simply cannot withstand scrutiny, however. On the contrary, the government's legitimate needs as owner and employer can be fully satisfied without undermining a public employee's reasonable expectation of privacy.

B. The Government's Interests As Owner And Employer Do Not Render A Public Employee's Expectation Of Privacy Unreasonable.

Noting that the government has different interests at stake with regard to its own as compared to private employees, petitioners argue that these interests are sufficient to eliminate all office privacy for government employees. That position, aside from creating the curious anomaly that public employees would have *less* Fourth Amendment protection than private employees, rests on a misconception of the scope and effect of the government's legitimate interests. If accepted, it would provide the government, including law enforcement officials, with a license to search a public employee's office, desk or file cabinets for any reason, whether employment-related or not.

The Fourth Amendment is not so easily brushed aside. Only recently the Court made plain that it proceeded with "caution in approaching claims that the Fourth Amendment is inapplicable in a given context." *Hudson* v. *Palmer*, 104 S. Ct. 3194, 3200 (1984). A sharply divided Court in that case, resting on the "paramount interest in institutional security," *id.* at 3201, nevertheless held that "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal

institutions," *id.* at 3200. Significantly, the Court pointed out that "[a] prison, 'shares none of the attributes of privacy of a home, an automobile, an *office*, or a hotel room.'" *Ibid.*, quoting *Lanza* v. *New York*, 370 U.S. 139, 143-44 (1962) (emphasis supplied).

In contrast to the prison situation, the Court during the following Term unanimously rejected the suggestion that "school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren." *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 741. Although the State asserted "the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment," and although the Court took "notice of the difficulty of maintaining discipline in the public schools today," it concluded nonetheless that "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* at 742.

Taken together, these cases strongly suggest that petitioners' position in this case is misguided. Even on cursory reflection, it is difficult to see why a government workplace should be unable to tolerate at least as much individual privacy as, if not considerably more than, a public school does.[6] A more thorough analysis confirms this conclusion as well. The particular government inter-

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[6] The Court in *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 741 n.5, did not "address the question, not presented by [that] case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." However such a case might come out, we think it is clear that differences between the schoolhouse and workplace strongly support a greater measure of privacy for an employee's desk than for a pupil's. It is well recognized, we submit, that significantly more private activity legitimately takes place in the office than at school.

ests at issue in the present context—its ownership interest in the office and its employment relationship with the occupant—are simply not sufficient to justify the total elimination of a public employee's office-based privacy.

As for the first consideration, it is clear that ownership does not confer Fourth Amendment protection, nor does its absence defeat it. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143. To be sure, an individual's expectation of privacy in an area that he does not own may be limited to the extent necessary to allow for appropriate entries by the owner—to provide cleaning, maintenance or repair services, for example. But that commonsense recognition has never been found sufficient to justify either the elimination of the occupant's privacy expectation or the suggestion that the owner can consent to a search of the premises. *See, e.g.*, *Chapman* v. *United States*, 365 U.S. 610 (1961) (occupant of a rented house has legitimate expectation of privacy that owner cannot defeat by consenting to search); *Stoner* v. *California*, *supra*, 376 U.S. at 487-90 (hotel guest has legitimate expectation of privacy that clerk cannot defeat by consenting to search).[7]

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[7] This point is underscored by the "common authority" cases, which involve consent to a search by one of several people who use the same property. *See, e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 169-71 (1974). "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that

It makes no difference in this regard whether the property is owned by the government or by a private party since the expectations of the occupant as well as the intrusions on privacy that are necessary to protect the owner's interests are identical in both situations. *See Donovan* v. *A.A. Beiro Construction Co.*, 746 F.2d 894, 898-99 & n.3 (D.C. Cir. 1984) (consent to search not supported by government's ownership of construction site). In sum, much as the government can protect its ownership interest in public housing without destroying the reasonable privacy expectations of its residents, it can protect its ownership interest in an office and its furnishings without destroying the reasonable privacy expectations of its occupant. Even petitioners do not suggest the contrary.

Petitioners do, however, attempt to defeat the legitimacy of a public employee's privacy interest in his office by raising a variety of employment-related claims based on the "government's proper purpose in 'promot[ing] efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service.'" Br. at 10, quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1882). While the concern about efficiency and integrity is plainly appropriate, the burden that petitioners would have it carry is much too great. First, by invoking the spectre that "government offices could not function if every employment decision becomes a constitutional matter,"

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any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7. It cannot plausibly be suggested in this case that there was the kind of "common authority" over respondent's office, desk and file cabinets that would justify a search based on the consent of anyone else.

Br. at 10, quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983), petitioners caution against recognizing a privacy interest here lest it "convert a work-related dispute or grievance into a constitutional tort." Br. at 12. The argument is both overblown and out-of-date.

The number of office-based searches that lead to constitutional litigation is, by any account, relatively small.[8] While we suspect that this is because most public employers respect their employees' privacy and find that they can maintain an efficient workplace without abridging it, the significant point is that the potential for converting employment disputes into Fourth Amendment claims is far less than the potential for converting such disputes into First Amendment claims: virtually all employment disputes involve some speech; very few involve searches. In view of this distinction, petitioners' suggestion that the application of the Fourth Amendment in the present circumstances will lead to "administrative paralysis" in the workplace, Br. at 21, is clearly untenable.

Moreover, to the extent that petitioners would seek to eliminate *all* work-related claims from the ambit of constitutional protection—to give a public employer "the same right to oversee its employees and investigate job performance as any private employer would have," Br. at 13—that argument comes too late in the day, as *Connick* itself made plain. 461 U.S. at 143-44. It is now well-settled that the government must observe basic constitutional limitations in dealing with its employees. *See, e.g., Garrity* v. *New Jersey, supra* (privilege against self-incrimination);

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[8] Of the twelve previous courts of appeals decisions dealing with office searches, only two were civil actions like the instant one; the others involved motions to suppress in criminal cases. *See* cases cited at pp. 23-24 & notes 15-16, *infra*.

Board of Regents v. *Roth*, 408 U.S. 564 (1972) (procedural due process). As a result, "state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 376 U.S. 886, 897-98 (1961).

Petitioners also argue that the "practical realities of office life render a privacy interest of the type respondent asserts unrealistic and unreasonable from a societal point of view." Br. at 16. The United States joins this argument, explaining that "because of the ordinary operation of the workplace and because of the employer's interest in effectively managing its business, an employee must be aware that from time to time the interior of his office, including items left in the office, will be exposed to the view of his business associates." U.S. Br. at 11-12. Depending on what it means, this position is, at best, inadequate to decide the issue presented here; at worst, it is far broader than necessary to satisfy the concerns that led to it in the first place.

To the extent that the governments are arguing that the practicalities of employment may "occasionally involve routine unconsented entries into an employee's office," U.S. Br. at 11, the claim is beside the point in this case. Not only does it appear that no such entries of respondent's office ever took place but, more significantly, the scope of the search at issue was far greater than the kind of intrusion that results from "[c]ooperative projects [that] often require one employee to enter another's office to borrow a book or to look at a case file." U.S. Br. at 11. Even assuming that an employee cannot reasonably expect that a co-worker or supervisor will *never* enter his

office without his consent,[9] that hardly means that he must abandon all expectations of privacy in every part of his office, including the desk and file cabinets. Anyone who has ever participated in cooperative work projects, we submit, is fully aware that a considerable measure of office-based privacy is completely compatible with such endeavors.

The values protected by the Fourth Amendment are simply too important to be subjected to the kind of all-or-nothing approach proposed by petitioners, as this Court has made clear on a number of occasions. For example, although a business establishment that is open to the public obviously cannot expect absolute privacy, that does not mean that a government agent can search areas or materials beyond those which a customer "would ordinarily see." *Lo Ji Sales, Inc.* v. *New York, supra,* 442 U.S. at 329. Similarly, the fact that a person does not have a legitimate privacy interest in the telephone numbers he calls, *see Smith* v. *Maryland, supra,* hardly means that he has no privacy interest in the contents of those phone conversations, *see Katz* v. *United States, supra. See also Mancusi* v. *DeForte, supra,* 392 U.S. at 377 (White, J. dissenting) (Fourth Amendment may protect private desk in shared office even if it would not protect the office

[9] Whether this is always a reasonable assumption is questionable. At least with respect to certain kinds of offices, such as a university professor's, the general understanding tends to be that the office will be entered by supervisors or co-workers only with the permission of its occupant. For that reason, the office is typically locked when the employee is not present. This may be a legitimate expectation, shared by the employer and employee alike, especially when confidential activity takes place in an office. In that regard, respondent's claim to a broad privacy expectation is particularly strong since he was involved not only in training young doctors, but also in treating psychiatric patients, both of which demand an extreme degree of privacy and confidentiality.

itself). *Cf. Arkansas* v. *Sanders*, 442 U.S. 753 (1979) (warrant required for search of luggage in trunk of automobile even when automobile itself was properly searched without a warrant).

The governments' reliance on routine entries to justify a wholesale elimination of office-based privacy thus sweeps far too broadly. On the other hand, a more sensitive approach—one that limits an individual's expectation of privacy only to the extent necessitated by the practical realities of the workplace—is insufficient to resolve this case. It goes without saying that a search of every area in an employee's office—which included a detailed review of private patient medical records as well as a Valentine's card and book of poetry to see who sent them—is anything but routine. Neither petitioners nor the United States claims that such practices are typical or commonplace in their respective workplaces. Indeed, petitioners acknowledge that they called "for legal advice before [entering respondent's office]." J.A. 51. That fact hardly suggests that they were conducting a routine office entry.[10]

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[10] Petitioners attempt to confuse this issue by describing their search as an "administrative inventory of the contents of an office assigned to its employee." Br. at 8. As we will show below, this characterization is incomplete, if not downright inaccurate. *See* note 20, *infra*. But even assuming that petitioners were conducting a full-scale office inventory, that activity, while perhaps affecting the reasonableness of a search, *see* p. 39, , *infra*, was by no means routine and thus would not be sufficient to defeat respondent's expectation of privacy in every part of his office. Significantly, petitioners argued in the court below (but not here) that "established hospital policy was to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal." Pet. App. 3. But the argument was rejected because the record would not support the claim that "inventory searches were

Accordingly, if petitioners' argument is to have any bearing on the facts of this case, the argument must be that a public employee simply has no privacy interest in his office, or in any part of it, that would prohibit the government from exhaustively searching it at will.[11] But that position is not even supported by the rationale that supposedly led to it in the first place.[12] Even by the

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conducted on a regular basis," and certainly Ortega "was never informed that his office could be entered at any time and investigated." Pet. App. 3. In any event, an employee's privacy interest in his office is obviously very different when he is about to leave and his employer needs to get the office ready for a new employee. At the time of the search in this case, however, "Ortega had neither been terminated nor was he scheduled to depart: he was merely on administrative leave pending completion of the investigation." Pet. App. 3. The office was not given to a new employee until several weeks after Ortega was fired in late September, which was long after the search. J.A. 45.

[11] The United States appears to concede this point. Thus, after devoting its whole first argument to the assertion that "[a] government employee has no reasonable expectation that a supervisor or co-employee will not *enter* his office in the course of performing employment-related duties," U.S. Br. at 7 (emphasis supplied), the United States blinks when it reaches the issue in this case: "we acknowledge that there are areas within an office, *such as the interior of a desk*, that present a closer question with respect to the existence of a legitimate expectation of privacy." U.S. Br. at 15 n.9 (emphasis supplied). It then suggests that this issue need not be decided because "petitioners' intrusion was reasonable within the meaning of the Fourth Amendment." *Ibid.* In short, the United States proposes resolution of a non-issue and avoidance of the issue presented.

[12] The *dicta* in *Mancusi* v. *DeForte*, *supra*, to the effect that "DeForte would have been entitled to expect that his . . . records would not be taken except with his permission *or that of his union superiors*," 392 U.S. at 369 (emphasis supplied), cannot fairly be read to suggest that an employee has no expectation of privacy that cannot be defeated by his employer at will. "The papers which were seized in

governments' account, the sole reason for curtailing an employee's privacy is the legitimate demands of the workplace. However strong that justification might be, at most it would support a restriction of office-based privacy no greater than the justification itself—*i.e.*, that any search based on work-related purposes is proper. But that result can be achieved, as petitioners and the United States both realize in the final sections of their respective briefs, by a rule that classifies all work-related searches as reasonable. While we dispute the merits of that position as well, *see* pp. 25-43, *infra*, we think it clear that a broader rule—eliminating a government employee's privacy expectation altogether—needlessly creates the potential for much mischief.

In the absence of any privacy protection, a public employee's office would be fair game for any kind of governmental search—be it a tap on his phone, bug on his wall or search of his desk—conducted for any purpose whatsoever.[13] This would include a search by the police

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[that] case belonged not to DeForte but the Union." *Id.* at 367. Thus, there is no question that appropriate union officials could make use of the records and consent to their production or seizure. *See* p. 34, *infra*. Moreover, even if other union officials could validly have consented to a search of the area where the records were kept—a matter not decided in *Mancusi*, *see* 392 U.S. at 369-70—the only plausible justification for such consent would have been that, in a shared office, several employees have common control over the area and thus each can consent to a search. *See* note 7, *supra*.

[13] There is no support for the implication in petitioners' argument, Br. at 16-20, that the legitimacy of an individual's expectatation of privacy depends on which governmental authority is conducting the search. *See, e.g. Donovan* v. *Dewey*, 452 U.S. 594, 599 (1981); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 530. That factor, as we discuss below, may affect the standard of reasonableness that applies to a particular search. *See* p. 33, *infra*. But in the absence of a legitimate privacy expectation, any governmental search would be proper.

(or by the employer acting at the direction of the police) for evidence of a crime. In addition, a supervisor who is concerned that an employee may be considered for a job that the supervisor wants, or who believes that an employee is making critical comments about him to other supervisors, may find it helpful to look around the office to see if he can turn up interesting or embarrassing information. Similarly, a government agent who is trying to persuade an employee to cooperate in an outside investigation may also conclude that an office search could lead to evidence that might facilitate his effort. The position taken by petitioners would permit all of these searches and more. There is no basis for such wholesale disregard for the privacy interests of all public employees.

At the same time, however, we recognize that there may be occasions when the legitimate demands of a particular workplace justify curtailing an employee's expectation of privacy. For example, a government employee whose primary responsibility is to answer public inquiries on the telephone may not expect that his supervisors will never monitor his calls to see how he is performing his job. Likewise, when a job involves dealing with highly sensitive information or handling valuable property, the government may have a need to conduct routine searches of otherwise private areas to protect its interests. It can accomplish this goal, where appropriate, by adopting a rule or regulation advising employees that certain areas will be subject to such searches and that private materials should not be stored or private activities conducted in these areas. As previously indicated, no such rule or practice was in effect in this case. *See* note 10, *supra*.[14]

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[14] Although the issue is not presented here, we do not think that a public employer, merely by promulgating a rule authorizing searches,

The decisions of the courts of appeals that have addressed these issues are consistent with the approach that we suggest. Thus, those courts have repeatedly found that government employees have a constitutionally-protected privacy interest in their offices as well as in other work-related areas. *See, e.g., United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (search of employee's desk); *United States* v. *Hagarty*, 388 F.2d 713 (7th Cir. 1968) (tap on employee's phone);[15] *United States* v. *Speights*, 557

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can automatically eliminate all Fourth Amendment protection at the workplace. *See Smith* v. *Maryland*, *supra*, 442 U.S. at 740 n.5. *Cf. Stoner* v. *California*, *supra*, 376 U.S. at 488 (questioning whether state law allowing hotel clerks to authorize police to search hotel rooms would be constitutional). As suggested in text, however, the legitimate needs presented by certain kinds of public jobs might call for a special approach. These situations would be somewhat analogous to administrative business searches of highly regulated industries "in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated industry." *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), *citing United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (liquor). But such circumstances are "relatively unique," *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313, and should not become a pretext for eliminating all office-based privacy in every government job. At a minimum, a pre-existing policy barring an employee's traditional office-based expectations of privacy should be upheld only when the government "has reasonably determined that warrantless searches are necessary to further" important employment-related interests. *Donovan* v. *Dewey*, *supra*, 452 U.S. at 600.

[15] In a later case, *United States* v. *Nasser*, 476 F.2d 1111, 1124 (7th Cir. 1973), the court distinguished *Hagarty* on the ground that pre-*Katz* standards were to be applied to the search in question. The court nevertheless recognized that, even prior to *Katz*, "a government office as well as one in the private sector is not a public area, and trespass can be committed against one who occupies the office." *Id.* at 1123.

F.2d 362 (3d Cir. 1977) (search of police locker); *Gillard* v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978) (search of guidance counselor's desk); *United States* v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978) (bug of police official's office).[16]

The exception to this line of cases has been in those circumstances where a public employer has "an accepted practice or regulation" advising employees that a particular work-area is not private and may be searched routinely. *Gillard* v. *Schmidt*, *supra*, 579 F.2d at 828. Uniformly, these case have involved jobs where there is an especially high risk of theft or other special security concerns. *See United States* v. *Bunkers*, 521 F.2d 1217 (9th Cir.) (search of postal locker conducted pursuant to regulation), *cert. denied*, 423 U.S. 989 (1975); *United States* v. *Sanders*, 568 F.2d 1175 (5th Cir. 1978) (per curiam) (same); *United States* v. *Donato*, 269 F. Supp. 921 (E.D. Pa.), *sum. aff'd*, 379 F.2d 288 (3d Cir. 1967) (search of U.S. Mint locker pursuant to regulation); *Shaffer* v. *Field*, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973) (per curiam) (search of sheriff's locker pursuant to pre-existing policy). *Cf. United States* v. *Collins*, 349 F.2d 863, 867-68 (2d Cir. 1965), (search of customs employee's work-jacket to retrieve stolen emerald), *cert. denied*, 383 U.S. 960 (1966).[17]

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[16] In *Williams* v. *Collins*, 728 F.2d 721, 728 (5th Cir. 1984), the court, while ruling on a qualified immunity claim in a § 1983 action, noted, without deciding, that "[i]t is by no means certain that [plaintiff] had a reasonable expectation of privacy in his government-furnished desk."

[17] Although *Collins* did not specifically rely on any pre-existing regulations or practice regarding searches, the court noted the "extremely broad" investigative authority of customs and postal agents, and stressed that the search was conducted in a "public area which was not shown to be segregated from the other work areas."

In sum, except in certain limited circumstances not present here, a public employee has a legitimate expectation of privacy in his office, desk and file cabinet that is entitled to Fourth Amendment protection. Since petitioners intruded upon that privacy expectation in this case, the question that remains is whether their intrusion was reasonable.

II. AN INVESTIGATIVE SEARCH BY A GOVERNMENT EMPLOYER MUST BE CONDUCTED PURSUANT TO A WARRANT BASED ON PROBABLE CAUSE OR, AT A MINIMUM, SOME QUANTUM OF INDIVIDUALIZED SUSPICION, NEITHER OF WHICH WAS PRESENT HERE.

Petitioners' final argument is that the search they conducted was proper since any search of an employees' office, desk and file cabinet should "be deemed reasonable so long as it is conducted for a work-related concern." Br. at 24; *accord* U.S. Br. at 15. This broad, open-ended standard would provide all levels of supervisory personnel with unbridled discretion to search their employees' offices for any arguably work-related reason. In our view, the Fourth Amendment demands considerably more before an employee's privacy can be invaded. While different standards of reasonableness may appropriately govern different types of work-related searches, when the purpose of an office search is to uncover personal evidence to be used against an employee under investigation—be it to fire him or prosecute him—the traditional standard of a warrant based on probable cause must be met. In any

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349 F.2d at 868. By contrast, the court pointed out that there were employee lockers located in a private area of the customs building and made clear that it meant to "imply nothing as to the constitutionality of a search of such a locker." *Id.* at 868 n.6.

event, there must, at a minimum, be some individualized showing of "reasonable suspicion" before such an investigative search can be found valid. Under either standard, the search in this case was unconstitutional.

A. An Exhaustive Office Search For Personal Evidence To Be Used Against A Public Employee Under Investigation Requires A Warrant Based On Probable Cause.

Asserting that the "[g]overnment's needs in this type of case are even greater than the needs recognized in [the school search case]," Br. at 23, petitioners claim that they are entitled to unprecedented authority when conducting investigative searches relating to employment. The special needs that they rely on to support this broad grant of discretion are workplace efficiency, discipline and informality. Br. at 22. In our view, petitioners' analysis is flawed both in its approach and its conclusion.

As we show, the presumptive standard of reasonableness—a warrant based on probable cause—serves important constitutional functions that should not be lightly disregarded. In this case, none of the few justifications for adopting a lesser standard, including the kind of "special circumstances" relied on in the school setting, are present. On the contrary, an investigative search into areas within the workplace where the employee reasonably expects privacy presents many of the same considerations as does a criminal search. The government can satisfy most of its legitimate work-related concerns without a search. To the extent that it wishes to search for and seize personal information that is kept within an employee's office—and to use that information against the employee—its need is diminished and an employee's privacy interests are great. In those circumstances, the gov-

ernment should be required to proceed pursuant to a warrant based on probable cause.[18]

1. The Traditional Standard Of Reasonableness And Its Limited Exceptions.

By its terms, the Fourth Amendment requires only that governmental searches and seizures be "reasonable." The Amendment itself, however, also has something to say about what is reasonable. Its second clause thus provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In view of this language, it has long been recognized that the presumptive standard of reasonableness for both civil and criminal searches is a warrant based on probable cause. *See, e.g.*, *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 528-29; *California* v. *Ciraolo*, 54 U.S.L.W. 4471, 4475 (U.S. May 19, 1986), (Powell, J., dissenting), quoting *United States* v. *Karo*, *supra*, 104 S.Ct. at 3304 ("Warrantless searches are presumptively unreasonable . . . ."). This standard is not merely texturally based; it also serves important functions in ordering state-individual relationships.

The warrant requirement "reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.'" *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759, quoting *United States* v. *United States District Court*,

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[18] This standard appropriately should be modified to include not only probable cause of a crime but also probable cause of a work-related violation when that is the basis for an investigative search. *See New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 744.

407 U.S. 297, 317 (1972). It is premised on the recognition that those who conduct an investigation are usually too zealous "to be the sole judges of when to utilize constitutionally sensitive means in pursuing their task." *United States* v. *United States District Court*, *supra*, 407 U.S. at 317. A warrant also defines "the scope and objects of the search, beyond which limits the inspection is not expected to proceed." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323 (footnote omitted). In this manner, it prevents a legitimate search from being transformed into a fishing expedition, and also assures that the assessment of reasonableness is made *before* the search, so that the constitutional question is not subject to post-hoc rationalization, possibly colored by the fact that helpful evidence has been uncovered.[19]

The probable cause standard is an expression of the likelihood of success required before a search can be conducted. This basic threshold reflects a general assessment of the competing governmental and individual interests typically at stake in a search: the former usually relate to efficient law enforcement; and the latter involve primarily "the right to be let alone," but also include a measure of protection "against compulsory production of evidence to be used against [the individual]." *Davis* v. *United States*, 328 U.S. 582, 587 (1946) (citations omitted). *See also Camara* v. *Municipal Court*, *supra*, 387 U.S. at 531 ("self protection" interest at stake in administrative search).

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[19] The importance of this last function is well-illustrated by the facts of the instant case. Although the search clearly appears to have been investigative in purpose, petitioners have repeatedly attempted to portray it as a pure inventory search that just happened to turn up evidence that could be used against respondent. *See* note 20, *infra*. Had a warrant been required, this confusion would have been clarified at the outset.

"The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

Despite the important as well as the presumptive validity of this traditional test of reasonableness, "the Court has recognized a few limited exceptions to the general rule." *United States* v. *Karo*, *supra*, 104 S.Ct. at 3304. These exceptions are premised on the fact that not every type of search will implicate precisely the same individual and/or governmental interests. Thus, where the intrusion on privacy is very limited, *see*, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 23-27 (1968) (stop and frisk); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879-80 (1975) (brief auto stop), or where there are exigent circumstances that make quick action necessary, *see*, *e.g.*, *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Schmerber* v. *California*, 384 U.S. 757, 770-71 (1966) (imminent destruction of evidence), or in rare instances where special governmental needs are present, *see*, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 558-560 (1979) (body cavity searches of detainees); *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 743 (school searches), the warrant requirement has been suspended, and, at times, the requirement of probable cause has been reduced to reasonable suspicion. In addition, "because [administrative] searches are neither personal in nature nor aimed at the discovery of evidence of crime," they are governed by a modified standard of probable cause, but a warrant still usually remains necessary. *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 537.

In sum, the standard of reasonableness in the Fourth Amendment context, while "not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, *supra*,

441 U.S. at 559, must nevertheless be determined against the backdrop of established precedent and carefully-drawn principles. It is to that task that we now turn on the basis of the facts presented in this case.

2. Investigative Work-Related Office Searches.

The search at issue here was comprehensive in scope and investigative in purpose. As the court of appeals explained, "[t]he entry into the office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega." Pet. App. 6.[20] In these

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[20] Petitioners continue to dispute this view, characterizing their search as an "administrative inventory of the contents of an office," Br. at 8, and insisting that its purpose was "to have state property identified and secured," Br. at 4. *See also* Br. at 8 n.5. The evidence plainly demonstrates, however, that petitioners' description is incomplete at best and, more likely, simply inaccurate. Even according to petitioner O'Connor, the search was intended in part to locate "records that had to do with . . . the areas that we were interested in investigating, and we wanted to—I felt it was reasonable to have access to what that material might be." J.A. 40. *See also* J.A. 38, 42. Consistent with this purpose, the officials who conducted the search immediately seized personal papers—including private correspondence and billing information relating to a private patient—that they believed were relevant to the charges against Ortega. J.A. 42, 54-58. Obviously, there would have been no reason to seize this material if the search was being conducted for the reasons that petitioners suggest.

Moreover, while there was deposition testimony stating that the search was also conducted in order to inventory the office contents and to separate state from private materials, J.A. 40, 63-64, the undisputed facts plainly suggest otherwise. In the first place, no inventory or separation of property was ever made. J.A. 62. Further, when the search was conducted, no decision to terminate Ortega had been reached and thus there was no reason to be emptying his office at that time. *See* note 10, *supra*. Finally, if petitioners were conducting an inventory (rather than an investigative search), it is difficult to see why Ortega, who plainly could have assisted in such an effort, was explicitly excluded.

circumstances, the usual justifications for modifying the traditional test of reasonableness were not present. To begin with, the intrusion on respondent's office-based privacy was anything but limited. Moreover, there were no exigent circumstances relating to the destruction or taking of property or evidence since respondent's office had readily been secured by changing its lock. J.A. 59.[21] And, in contrast to an administrative search, the search at issue here was specifically focused on someone who was already under suspicion. Petitioners do not even dispute these points. They rely instead on a claim of "special circumstances," seeking to analogize the instant case to the school searches in the *T.L.O.* case. In our view, the analogy is inapt and the claim of special circumstances is meritless.

a. The Analogy To School Searches.

Petitioners' reliance on *New Jersey* v. *T.L.O.*, *supra*, to support a diluted standard of reasonableness for all work-

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[21] At one point petitioners state that "[f]urther justification for the entry [into Ortega's office] was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15 and 16. Dr. O'Connor was concerned that a theft of state property may have occurred." Br. at 4 (citation and footnote ommitted). The court of appeals apparently agreed with this suggestion. Pet. App. 5 n.2. We do not think that the record plausibly can be read to support such a view, however. Both Dr. O'Connor and the hospital administrator, Friday, explicitly testified that the removal of the computer was *not* a basis for entering the office. J.A. 39, 59. In any event, a search for the computer itself—irrespective of the standard required—would have supported nothing further than an entry into Dr. Ortega's office. The additional searches of his desk and file cabinets could not have been justified on that ground. *See, e.g.*, *Terry* v. *Ohio*, *supra*, 392 U.S. at 20 (actual search must be "reasonably related in scope to the circumstances which justified the interference in the first place"); *United States* v. *Place*, 462 U.S. 696, 705-06 (1983).

related office searches is misplaced.[22] The controlling considerations in that case were, first, the recognition that "maintaining security and order in the school requires a certain degree of flexibility in school disciplinary procedures," and, second, the significance attributed to "the value of preserving the informality of the student-teacher relationship." 105 S.Ct. at 743 (citations omitted). The warrant requirement and the probable cause standard were both found to be incompatible with fostering these important interests.

The same considerations are not present here. The need to "maintain discipline in the workplace," Pet. Br. at 22, does not present nearly the kind of problem that the same need presents in the schools. Many students, unfortunately, do not want to be in school and therefore are often disruptive. Teachers and administrators nevertheless have an obligation to work with these students and to keep them in school if at all possible. The combination of such factors often makes it as difficult to maintain order in schools as almost any place other than in correctional facilities. By contrast, employees, who are usually more mature than students, are aware that their livelihoods are at stake. The threat of dismissal, lack of promotion and other workplace incentives thus serve to maintain at least a reasonable level of decorum.

By the same token, concerns about "the informality of the employer-employee relationship," Pet. Br. at 22, are also not analogous to the school situation. The employer-employee relationship is, at bottom, a business rela-

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[22] Curiously, despite their heavy reliance on *T.L.O.*, petitioners nevertheless seek an even broader standard of reasonableness for a workplace search than what they describe as the "somewhat formalized" standard applicable to school searches. Br. at 24. That position is way off the mark. *See* pp. 40-43, *infra*.

tionship. Unlike a teacher, an employer does not serve an *in loco parentis* function, seeking to instill basic values in those in his charge. This difference in function, in turn, means that the need for, and even the appropriateness of, informality is likely to be very different in the two settings. Certainly when, as here, the employer is looking for evidence that can lead to an employee's dismissal, the relationship has moved well beyond the stage of informality and, if anything, has already become adversarial. The significance of this last point is underscored by the fact that, even in the schoolhouse, the Court left open the possibility that a different standard of reasonableness might be appropriate for "searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *New Jersey* v. *T.L.O. supra*, 105 S.Ct. at 744 n.7. For these reasons, *T.L.O.* simply will not carry the burden that petitioners have assigned to it in this case.

b. The Government's Need For Efficiency And The Competing Individual Interests.

The final justification that petitioners point to for reducing the traditional Fourth Amendment standard of reasonableness is one that was not present in *T.L.O.*: *i.e.*, the government's need to operate "efficiently and effectively through proper supervision and administration of its employees." Br. at 22. Once again, we do not dispute that his is an important concern. We do think, however, that the relationship between that concern and a government employer's need to conduct investigative searches like the one at issue here is far less than petitioners would like it to appear.[23] Properly understood, moreover, the

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[23] In fact, petitioners do not even directly address this relationship at all, although they quote the general rule that the test of reason-

concern about workplace efficiency should not be found adequate to justify abridging an employee's significant privacy interests on less than the traditional standard of reasonableness.

The first thing to realize about the government's legitimate employment needs is that in almost all instances they can be satisfied without conducting an investigative search of an employee's office. The materials in an office that are likely to be most relevant "in evaluating an employee's performance, even when he is suspected of misconduct," U.S. Br. at 18, are employment-related papers and documents. But, those materials, as well as any other government property in an employee's office, must be turned over upon demand. *See, e.g., Wilson* v. *United States, supra,* 221 U.S. at 380 ("[I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his alleged criminal dereliction.") An employee who fails to comply with

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ableness derives from "balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court, supra,* 387 U.S. at 536-37, quoted in *New Jersey* v. *T.L.O., supra,* 105 S.Ct. at 741. This rule, however, plainly does not mean that the importance of the government purpose, by itself, should affect the standard of reasonableness. Obviously, the government's interest in apprehending and convicting violent offenders is very great, but that is no basis for relaxing Fourth Amendment protections. The key consideration is the relationship between the *need to search* and the government purpose. For example, random auto stops to check licenses clearly serves a lesser governmental purpose than traditional law enforcement. But there may be no other way to accomplish the first function, and thus it is governed by a much less stringent standard of reasonableness. *See Delaware* v. *Prouse, supra.*

such a request can be dismissed for that reason alone.[24] *See, e.g., Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). At that point, of course, the government has no further interest in evaluating the employee's performance or need to pursue a discharge proceeding.[25]

A search of an employee's office intended to facilitate an investigation of work-related charges, therefore, serves only one necessary purpose: to provide access to *private* materials that would not otherwise be available to the government. When that is the purpose of a search, however, the balance of governmental and individual interests points to a strict standard of reasonableness. On the one

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[24] No such request to turn over government papers was made of respondent in this case.

[25] If the government still needs to retrieve its property in these circumstances, there are reasonable means available for it to achieve that goal as well. As indicated above, when exigent circumstances are present—based on a concern that government property may be taken or destroyed—the property can be seized without a warrant. *See* p. 29, *supra*. In other situations, the government should be able to protect its interests through impounding the office by changing the locks or through some other reasonable approach. For example, in *Chocallo* v. *Bureau of Hearings and Appeals*, 548 F.Supp. 1349, 1363 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983), after an administrative law judge had been asked to turn over a case file on a matter that had been reassigned by an order of the Appeals Council, the judge's superior authorized his secretary "to enter the [judge's] office and to make a visual inspection for the [requisite] file, but not to open any drawers or file cabinets." Even if deemed a search, we do not think that a limited entry for this kind of non-investigative purpose would be unreasonable. *See also Jafree* v. *Scott*, 372 F.Supp. 264, 274 (N.D. Ill. 1974) (supervisors "had a right and duty to inspect documents and property that were being packaged and removed from the offices of the Attorney General by [a discharged employee]"), *aff'd in part, rev'd in part*, 519 F.2d 1405 (7th Cir. 1975).

hand, that kind of material will almost invariably be of limited importance in evaluating an employee's work behavior and performance. While the government may have an abstract interest in knowing about an employee's private activities, and how they reflect on his integrity, that interest only becomes truly significant when the employee's private activities affect his job performance. To find the answer to that latter question, however, the government has many appropriate options readily available to it, including observing the employee, examining his work product, and talking with his supervisors and coworkers as well as with the employee himself. In short, as in the law enforcement area generally, there are usually other investigative means available to satisfy the government's legitimate concerns.

On the other hand, when the government seeks the authority to search for private materials that are kept in an employee's office and to use those materials against the employee at a discharge proceeding, the individual interests at stake are very substantial. Contrary to the implication suggested by the United States, in that situation, much as in a criminal investigation, the individual has already been "singled out on the basis of suspicion," and the government is attempting "to ferret out evidence of [wrongdoing]." U.S. Br. at 16. In both instances, moreover, the government is claiming the right to search for, and to use, an individual's private materials to further its antagonoistic objectives.

In addition, although being fired for violating a work rule is not the same as being convicted of a crime, it is clearly a serious sanction, resulting both in the loss of employment and in stigmatizing an employee. *See Board of Regents* v. *Roth*, *supra*, 408 U.S. at 573. Indeed, many violations that are sufficient to justify an employee's dis-

missal may lead to a criminal prosecution as well. *See* note 8, *supra*. In the present case, for example, petitioners claim that they were concerned "that a theft of state property may have occurred." Br. at 4. If the search of Dr. Ortega's office had substantiated that concern, there is no reason to expect that he would not have been prosecuted as a result.

In sum, the competing individual and governmental interests at stake in an investigative search of a public employee are very similar to those at stake in a criminal case. While it is doubtless true that the government could be more efficient in both instances if it could search at will or even under a diminished standard of reasonableness, that measure of efficiency simply comes at too great a cost.

The Court has previously recognized a similar point in the Fifth Amendment context, holding that the government cannot require a public employee to forgo his privilege against self-incrimination. *See, e.g., Gardner* v. *Broderick, supra; Garrity* v. *New Jersey, supra; Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968). As the most recent case in this line explained, the "[g]overnment has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity, Gardner,* and *Sanitation Men,* where alternative methods of promoting state aims were no more apparent than here." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977). In like manner, the application of full Fourth Amendment protections would limit the government's ability to search for evidence of personal wrongdoing that might also call into question an employee's integrity, but that, in the end, much like the invocation of the Fifth

Amendment privilege, may have no real effect on his actual work performance.[26] Significantly, in both instances, the government still remains able to evaluate that performance directly. Thus, just as a public employee receives full Fifth Amendment protection despite its potential effect on workplace efficiency, he is entitled to the full protection of the Fourth Amendment as well.[27]

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[26] Since the Amendments themselves operate differently, their precise effects on the workplace necessarily vary. For example, because a public employer has a need to evaluate his employees, the Fifth Amendment does not prohibit him from requiring an employee "to answer questions specifically, directly and narrowly related to the performance of his official duties." *Gardner* v. *Broderick*, *supra*, 392 U.S. at 278. But the answers to those questions, unlike the evidence uncovered in an office sear[illegible] cannot be used against the employee in a criminal proceeding. *It* Moreover, the Fourth Amendment, in contrast to the Fifth, d[illegible]ot bar access to certain information altogether; it only require[illegible]at the search be reasonable. In that regard, there is no reason [illegible]believe that government employers "could not achieve their go[illegible]within the confines of a reasonable warrant requirement," *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 533, when they are conducting an investigative search.

[27] The courts of appeals that have found that a public employee has a legitimate expectation of privacy in his office have all held that a search must satisfy the traditional Fourth Amendment standard of reasonableness, although the searches in those cases arose in somewhat different contexts, and were usually conducted by law enforcement authorities. *See* cases cited at pp. 23-24, *supra*. *United States* v. *Blok*, *supra*, does not support a contrary result, as the United States suggests. Br. at 19. The *Blok* court stated, "[n]o doubt a search of [an employee's desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use." 188 F.2d at 1021. That general dictum, however, simply does not address the kind of search at issue here. When an employer goes into an office looking for a file that it needs for work (rather than for personal information relevant to an investigation of an employee under suspicion), the balance of individual and government interests is entirely different, even assuming that the entry could properly be categorized as a search at all. *See* pp. 17-18, *supra*.

Nor would such a conclusion mean, as the United States suggests, that a supervisor or co-worker would have "to apply to a magistrate for a warrant every time he needs to enter an employee's office." Br. at 16. On the contrary, the warrant requirement would, as it should, remain the exception in the workplace. As we indicated above, a "routine office entry" typically does not even raise a Fourth Amendment question. *See* pp. 17-18, *supra*. Similarly, a public employer may, in appropriate circumstances, adopt regulations or policies advising an employee ahead of time that certain areas are *not* private and thus will be subject to search. *See* p. 22, *supra*. In addition, searches that are not investigative in nature—such as a true office inventory, or perhaps even a random search designed to *deter* certain activities at the workplace—might properly be subject to a different standard of reasonableness. *See, e.g., Chenkin* v. *Bellevue Hospital Center, supra* (checkpoints at hospital exits to conduct random searches of employee's packages and knapsacks; employee has option of checking these matters before entering hospital). *Cf. Delaware* v. *Prouse, supra* (routine automobile stops for license and registration checks).

Even in the investigative context, moreover, not every search need be made pursuant to a warrant based on probable cause. In addition to the usual exceptions to the warrant requirement, such as for exigent circumstances, there may also be other occasions where a lesser standard is justified. For example, in jobs that raise special concerns--such as those involving national security or other highly sensitive matters—the balance of relevant considerations might support a different approach. *See, e.g., Security & Law Enforcement Employees, District Council 82* v. *Carey*, 737 F.2d 187, 203-04 (2d Cir. 1984) (body cavity searches of correction officials may be based on reasonable suspicion because of the special problems of prison administration).

In the instant case, however, no such extenuating factor was present. The search of respondent's office, therefore, could only be undertaken pursuant to a warrant based on probable cause. By failing to meet that standard, petitioners violated Dr. Ortega's Fourth Amendment rights.

B. Even Under A Minimalist "Reasonable Suspicion" Standard The Search Of Respondent's Office Was Invalid.

Minimizing, if not trivializing, an employee's interest in office-based privacy, and ignoring the specific governmental need for investigative searches at the workplace, petitioners and the United States propose that any search of an office "be deemed reasonable if conducted for a work-related concern." Pet. Br. at 24; *accord* U.S. Br. at 15. In our view, this is no standard at all: it provides a wide range of government officials with exceptionally broad, discretionless authority to search their employees' offices. Even assuming that, in light of the special needs of the workplace, the Fourth Amendment is found not to require a warrant and probable cause for an employment-related investigative search of an office, such a search must, at a minimum, be based on a standard of "reasonable suspicion."

The principles that govern this determination are well-settled. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' *upon the exercise of discretion* by government officials . . . ." *Delaware* v. *Prouse*, *supra*, 440 U.S. at 653-54 (emphasis supplied). In almost all instances, this is achieved through requiring "some quantum of individualized suspicion," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976), which has the effect of assuring "that the facts upon which an intrusion is based [will] be capable

of measure against an 'objective standard.'" *Delaware* v. *Prouse*, *supra*, 440 U.S. at 654, quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 21. In the few situations where "the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied on to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, *supra*, 440 U.S. 654-55 (citations and footnotes omitted).

Applying these principles to the instant case—*i.e.*, to a search which is investigative in purpose and personal in nature—we think it is clear that at least some requirement of individualized suspicion is necessary.[28] As indicated above, the fact that the government is claiming the authority to search for private information to use against an employee demonstrates that the intrusion on the individual's interests is substantial. Such an intrusion should not be tolerated on the basis of a Fourth Amendment standard that lacks any objective individualized focus unless

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[28] The standard proposed by petitioners and the United States does not even provide for the kinds of external checks on the exercise of official discretion—such as review by a disinterested superior let alone a magistrate—that usually govern searches in the absence of a requirement of individualized suspicion. That view, however, ignores the fact that "[t]he 'grave danger' of abuse of discretion does not disappear simply because" the government acts as an employer. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 662, quoting *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 559. Only in very rare and specialized circumstances has such broad governmental authority to search been upheld. *See United States* v. *Martinez-Fuerte*, *supra* (border stops of automobiles); *United States* v. *Villamonte-Marquez*, 103 S.Ct. 2573 (1983) (entries on ships to inspect papers conducted pursuant to legislation initially adopted at the time of the Bill of Rights).

there are compelling reasons to do so.[29] The generalized claims concerning the need for efficiency in the workplace that have been advanced in this case are plainly insufficient to meet that burden.

Indeed, this Court has never approved a standard of reasonableness in any Fourth Amendmnt case involving a search of an individual who is under investigation on a lesser standard than "reasonable suspicion." Even in the schoolhouse, where constitutional protections are usually the most diluted, the Court has held that there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 744 (footnote omitted). When the government seeks to conduct a full-scale investigative search of an area in which an employee has a legitimate privacy expectation, certainly at least that much of a standard must be satisfied.[30]

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[29] As indicated above, *see* p. 39, *supra*, the need for individualized suspicion might be different when a search is not being used to uncover evidence against an individual already under investigation. *See New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 744 n.8.

[30] The United States "emphasize[s] that this would be a different case if petitioners had searched a private item found in the office, such as a briefcase or a purse, . . . [because] employees have a far stronger expectation of privacy in such personal effects . . . , and the government's need to search for business-related reasons is substantially less compelling." U.S. Br. at 21 (citation and footnote omitted). The distinction is unconvincing. An employee's briefcase, much like his desk and file cabinets, often contains work-related materials along with personal materials. (If anything, a desk is more likely to contain personal materials.) Thus, an employee's expectation of privacy, as well as the government's need for access, would appear to be similar with respect to a desk and briefcase. The sole distinction, in most instances, is that the employee owns his briefcase, but not his desk.

Finally, we belive that, tested against any standard containing an element of individualized suspicion, the search in the instant case must be found wanting. Throughout this litigation petitioners have never taken the position that they had any basis for concluding that evidence relating to the charges pending against Dr. Ortega would be found in his office. Rather, they simply searched the office, thinking it was "reasonable to have access to what that material might be"—*i.e.*, to whatever material they might find that would be relevant "to the areas we were interested in investigating."[31] J.A. 40. Plainly they had no basis to expect that they would find the private materials that they actually seized: the personal correspondence from respondent's former resident and the billing information relating to his private patient.

In sum, an appropriate balance of the competing interests in the present case merits adherence to the traditional Fourth Amendment standard of reasonableness: a warrant based on probable cause. At minimum, however, a standard requiring some measure of individualized suspicion was necessary. Since petitioners are unable to satisfy any such standard, their search of respondent's office was unconstitutional.

But that fact is not only insignificant in these circumstances, *see* pp. 14-15, *supra*, it is also not always true. There are times, especially when an employee needs to transport large amounts of paper, when the employer provides a briefcase. And, on occasion, an employee might even purchase his own desk or file cabinets. Under the United States' view, these distinctions in ownership apparently would significantly affect the privacy protections of an employee.

[31] Even assuming that petitioners had reasonable grounds for suspecting that respondent had taken the computer during the weekend of August 15-16, 1981, that concern was neither the basis of the search nor sufficient to justify its scope. *See* note 21, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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